Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	**CC Docket No. 96-98**

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association ("TRA"), a national trade association representing more than 800 entities engaged in, or providing products and services in support of, telecommunications resale hereby urges the Commission to retain, and in fact, expand, its current minimum list of the network elements incumbent LECs must make available on an unbundled basis to requesting telecommunications carriers. As TRA will demonstrate herein, competitive LECs are not yet operating in substantial sectors of the nation. Moreover, even where operational, competitive LECs, which are under no legal obligation to do so, are not making network elements available to other competitive providers. Hence, absent acquisition and deployment of their own facilities (which cannot, consistent with Congressional intent be used to satisfy Section 251(d)(2)), the seven listed network elements are simply not currently available, in any practical sense, to competitive providers from sources other than incumbent LECs. And even if any of the seven listed network elements were to become available from sources other than incumbent LECs, they could not, given the continued resistance of incumbent LECs to competitive entry, be substituted for unbundled access to incumbent LEC networks without materially impairing the ability of competitive LECs to provide local service.

On a forward-looking basis, TRA urges the Commission to detail the showings an incumbent LEC must make, including the presumptions it must overcome, and the procedures an incumbent LEC must follow, to be relieved of its obligation to make any given network element available on an unbundled basis in any given market. TRA envisions a procedure pursuant to which the Commission will determine for an interim period -- *i.e.,* two or more years -- whether an incumbent LEC has made a showing sufficient to warrant relief from its obligation to make a

specified UNE available in an identified market, providing in so doing guidance as to the meaning and applicability of the standards adopted in this proceeding. Thereafter, state commissions would make the initial determination of whether an incumbent LEC had satisfied the Commission-promulgated standards, with the Commission acting as an appellate forum with the ability to stay state commission actions which are clearly contrary to Commission requirements.

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The Telecommunications Resellers Association ("TRA")[1], through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. §1.415, hereby submits its comments in response to the *Second Further Notice of Proposed Rulemaking*, FCC 99-70, released April 8, 1999, in the captioned docket ("*FNPRM*"). The *FNPRM* was issued by the Commission in response to a determination by the U. S. Supreme Court that the Commission had not "adequately consider[ed]" the "necessary and impair" standards embodied in Section 251(d)(2) of the Communications Act of 1934 ("Communications Act"), as amended by the

[1] A national trade association, TRA represents more than 800 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry, and to protect and further the interests of entities engaged in the resale of telecommunications services.

Telecommunications Act of 1996 ("Telecommunications Act"),[2] in identifying the seven network elements incumbent local exchange carriers ("LECs") must, at a minimum, make available to requesting telecommunications carriers on an unbundled basis.[3] Accordingly, the *FNPRM* seeks comment on "the issues of : (1) how, in light of the Supreme Court ruling, the Commission should interpret the standards set forth in section 251(d)(2); and (2) which specific elements the Commission should require incumbent LECs to unbundled under section 251(c)(3)."[4]

TRA urges the Commission to retain, and in fact, expand, its current minimum list of the network elements incumbent LECs must make available on an unbundled basis to requesting telecommunications carriers. As TRA will demonstrate herein, competitive LECs are not yet operating in substantial sectors of the nation. Moreover, even where operational, competitive LECs, which are under no legal obligation to do so, are not making network elements available to other competitive providers. Hence, absent acquisition and deployment of their own facilities, the seven listed network elements are simply not currently available, in any practical sense, to competitive providers from sources other than incumbent LECs. And even if any of the seven listed network elements were to become available from sources other than incumbent LECs, they could not, given the continued resistance of incumbent LECs to competitive entry, be substituted for unbundled access to incumbent LEC networks without materially impairing the ability of competitive LECs to provide local service.

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2 47 U.S.C. § 251(d)(2).

3 AT&T Corp., et al. v. Iowa Utilities Board, 119 S.Ct. 721, 734 - 36 (1999).

4 FNPRM, FCC 99-70 at ¶ 1.

On a forward-looking basis, TRA urges the Commission to detail the showings an incumbent LEC must make, including the presumptions it must overcome, and the procedures an incumbent LEC must follow, to be relieved of its obligation to make any given network element available on an unbundled basis in any given market. TRA envisions a procedure pursuant to which the Commission will determine for an interim period -- *i.e.,* two or more years -- whether an incumbent LEC has made a showing sufficient to warrant relief from its obligation to make a specified UNE available in an identified market, providing in so doing guidance as to the meaning and applicability of the standards adopted in this proceeding. Thereafter, state commissions would make the initial determination of whether an incumbent LEC had satisfied the Commission-promulgated standards, with the Commission acting as an appellate forum with the ability to stay state commission actions which are clearly contrary to Commission requirements.

I.

INTRODUCTION

TRA is the largest association of competitive carriers in the United States, numbering among its members not only the large majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers, as well. Indeed, more than a third of TRA's carrier members are currently providing local exchange service, with an additional 20 percent or so anticipating market entry within the foreseeable future.[5] TRA's carrier members are offering local exchange service in 46 of the 50 states, taking service from all of the Bell Operating Companies ("BOCs"), the GTE telephone operating companies and a number of other

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[5] Telecommunications Resellers Association, <u>1998 Reseller Membership Survey and Statistics</u>, 1, 16 (July 1998).

independent LECs.[6] TRA's local carrier members are providing service to residential, as well as business, users, with the former representing roughly a quarter of total customer lines served by TRA local carrier members.[7] While the majority of TRA's local carrier members provide service through total service resale, use of unbundled network elements ("UNEs") has been steadily increasing. In fact, *more than a third of TRA's local carrier members are currently making use of UNEs in one or more markets,* with the greatest concentration of such usage in the Bell Atlantic and, to a lesser extent, the BellSouth territories.[8]

While resale continues to be the predominant entry strategy for small carriers seeking to provide competitive local exchange service, the Commission correctly recognized that competitors that enter the local market through resale of incumbent LEC services tend ultimately to transition to UNE-based service provision, either exclusively or in conjunction with some measure of facilities deployment, when customer bases and revenue streams in given markets reach levels that warrant such strategic shifts.[9] The limited margins available for local service resale render it extremely

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6 Telecommunications Resellers Association, Member Survey of Local Competition, 2, 6 (April 1998).

7 Id. at 8, 9, 10.

8 Id. at 5, 7.

9 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶ 12 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, 12 FCC Rec. 12460 (1997), *aff'd/vacated in part sub. nom.* Iowa Util. Bd v. FCC, 120 F.3d 753 (1997), *writ of mandamus issued* 135 F.3d 535 (8th Cir. 1998), *vacated in part sub. nom.* AT&T Corp., et al. v. Iowa Utilities Board, 119 S.Ct. 721 (1999). Such an evolution follows the interexchange model in which "switchless" resellers deployed switches as they grew larger and secured, as a result, access to greater amounts of investment capital. Thus, in the early 1990s, few among TRA's interexchange carrier members had deployed any switching capability. By 1995, roughly one third of TRA's interexchange carrier members reported that they were switch-based in at least some markets. That percentage rose to more than 50 percent in 1998. Telecommunications Resellers Association, 1998 Reseller Membership Survey and Statistics, 1 (July 1998).

difficult to maintain and grow a market presence over the long term using a resale entry strategy exclusively.[10] With some notable exceptions in selected states,[11] a UNE-based local service strategy is generally far more competitively viable than exclusive reliance on full service resale. Facilities deployment further enhances competitive options, but this service strategy is not a realistic alternative for many small carriers which lack the financial wherewithal to undertake major capital investments.[12] Thus, among TRA's local carrier members, less than a quarter currently plan switch deployment in one or more markets, leaving more than three quarters of TRA's local carrier members reliant exclusively upon full service resale or an end-to-end UNE-based service strategy for the foreseeable future.[13] Virtually all of TRA's local carrier members employ full service resale or an end-to-end UNE-based service strategy in some percentage of the local markets they serve.

A UNE-based local service strategy will only work for small competitors, however, if incumbent LECs are required to provide the full panoply of UNEs to competitors at cost-based rates. Since small competitors pursuing a UNE-based local service strategy will generally provide

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[10] Among TRA's local service members, 65 percent report net margins of zero or less from the provision of local exchange service through full service resale. Telecommunications Resellers Association, Implementation of the Telecommunications Act of 1996, A-8 (submitted to the Committee on Commerce of the U.S. House of Representatives on December 1, 1998).

[11] In certain states – *e.g.*, South Carolina – the cost of the local loop UNE exceeds the cost of a retail loop, therefore rendering resale more financially viable.

[12] As the Commission has recognized, small carriers "have less of a financial cushion than larger entities." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 61. More than half of TRA's resale carrier members generate annual revenues of less than \$25 million, with roughly a quarter showing annual revenues of less than \$5 million, and approximately a third listing annual revenues of less than \$10 million. Telecommunications Resellers Association, 1998 Reseller Membership Survey and Statistics at 4. The majority of TRA's local service members derive less than \$6 million annually from the provision of local service. Telecommunications Resellers Association, Implementation of the Telecommunications Act of 1996 at A-6.

[13] Telecommunications Resellers Association, Member Survey of Local Competition at 12.

service using UNEs exclusively, the absence of a single UNE would render such a UNE-based local service strategy unworkable.[14] Indeed, even the unavailability of existing combinations of UNEs during the period before the U.S. Supreme Court overruled the U.S. Court of Appeals for the Eighth Circuit proved to be an effective block for the large majority of small competitors seeking to pursue a UNE-based local entry strategy. As the Commission predicted, small competitors were "seriously and unfairly inhibited in their ability to use unbundled network elements to enter local markets," by the pervasive incumbent LEC practice of "separating elements that . . . [were] ordered in combination" and refusing to "combine elements."[15] A gaping hole in the middle of a virtual local network comprised of all essential UNEs but one would obviously defeat a small carrier.

II.

ARGUMENT

A. The Supreme Court Decision Must be Read in its Entirety

In *AT&T Corp. v. FCC*, the U.S. Supreme Court upheld all but one of the challenged Commission-promulgated local competition rules. The sole Commission error identified by the Court was the Commission's failure to "adequately consider the 'necessary and impair' standards" when it directed incumbent LECs to "provide requesting carriers with access to a minimum of seven

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[14] As the Commission remarked early on, a UNE-minus one approach would "seriously inhibit the ability of potential competitors to enter local markets through the use of unbundled elements, and thus retard the development of local exchange competition." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 329.

[15] Id. at ¶ 293.

network elements."[16] As explained by the Court, the Commission erred in its implementation of Section 251(d)(2) by not "apply[ing] *some* limiting standard, rationally related to the goals of the [Telecommunications] Act."[17] Specifically, the Court faulted the Commission for not assessing the "availability of elements outside the incumbent's network," and by "assum[ing] that *any* increase in cost (or decrease in quality) imposed by denial of a network element [would] render[] access to that element 'necessary,' and cause[] the failure to provide that element to 'impair' the entrant's ability to furnish its desired services."[18] Thus, the Court concluded, Section 251(d)(2) "requires the Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."[19] While the Court made passing reference to the incumbent LECs' argument that the "necessary and impair" standard should be "something akin to the 'essential facilities' doctrine of antitrust theory," it offered little guidance as to the nature of an appropriate test other than to advise that it should be "*some* limiting standard."[20]

As noted above, this was the only error identified by the Court in the Commission's local competition rules. Thus, the Court agreed that the Commission had general jurisdiction to implement the local competition provisions of the Telecommunications Act, emphasizing that "§201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996

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16 AT&T Corp., et al. v. Iowa Utilities Board, 119 S.Ct. 721 at 734.

17 Id.(emphasis in original).

18 Id.

19 Id. at 735.

20 Id. at 734 (emphasis in original).

Act applies."[21] Elaborating, the Court confirmed that the Commission had jurisdiction to "design a pricing methodology," and to "promulgate rules regarding state review of pre-existing interconnection agreements between incumbent LECs and other carriers, regarding rural exemptions, and regarding dialing parity."[22] The Court also upheld the Commission's "pick and choose" rules, declaring that "[t]he FCC's interpretation [of Section 252(i)] is not only reasonable, it is the most readily apparent," and indeed, "more generous to incumbent LECs than § 252(i) itself."[23]

Critically for purposes of this proceeding, the Court recognized that the Commission's reading of the term "network element" to include "operator services and directory assistance, operational support systems (OSS), and vertical switching functions such as caller I.D., call forwarding, and call waiting," was "eminently reasonable."[24] The Court also upheld the Commission's "'all elements' rule, which allows competitors to provide local phone service relying exclusively on the elements in an incumbent's network."[25] Finally, the Court recognized that the Commission's prohibition against separation by an incumbent of "already-combined network elements before leasing them to a competitor," was "well within the bounds of the reasonable" as a means of "ensuring against an anticompetitive practice."[26]

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21 Id. at 730.

22 Id. at 732.

23 Id. at 737.

24 Id. at 733 - 34.

25 Id. at 736.

26 Id. at 737.

Other key elements of the Commission's "new regulatory regime"[27] were not disputed by the Court. The Court, for example, did not question the Commission's view that the Telecommunications Act directs the Commission to "affirmatively promote competition using tools forged by Congress," and "[r]ather than shielding telephone companies from competition, . . . requires telephone companies to open their networks to competition."[28] And the Court did not disagree with the Commission that Congress established three "co-equal" paths of entry into the local market, . . . neither explicitly nor implicitly express[ing] a preference for one particular entry strategy," and that the Commission's "obligation . . . [was] to establish rules that . . . ensure that all pro-competitive entry strategies may be explored."[29]

More directly pertinent to this proceeding, the Court did not dispute the Commission's judgment that "[n]ational requirements for unbundled elements," including identification of "a minimum list of unbundled network elements that incumbent LECs must make available to new entrants upon request," would further "the procompetitive goals of section 251(c)(3)," by, among other things, "allow[ing] new entrants, *including small entities*, seeking to enter local markets on a national or regional scale to take advantage of economies of scale in network design" and "enhancing the ability of new entrants, *including small entities*, to raise capital."[30] And the Court did not question the Commission's refusal to "adopt non-binding national guidelines for

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27 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 1.

28 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 1.

29 Id. at ¶ 12.

30 Id. at ¶¶ 241, 242 (emphasis included).

unbundled elements that the states would not be required to enforce."[31] Finally, the Court found no fault with the Commission's interpretation of the term "proprietary" as utilized in Section 251(d)(2)(A).

B. The Terms "Proprietary," "Necessary," and "Impair" Must be Defined in a Manner "Rationally Related to the Goals of the [Telecommunications] Act"

In directing the Commission to revisit its interpretation and application of Section 251(d)(2), the U.S. Supreme Court declared that whatever "limiting standard" the Commission adopted should be "rationally related to the goals of the [Telecommunications] Act."[32] In applying this mandate, it is noteworthy that the Court recognized that "[t]he Telecommunications Act of 1996 . . . fundamentally restructures local telephone markets," subjecting incumbent LECs "to a host of duties intended to facilitate market entry," foremost among which is the "LEC's obligation . . . to share its network with competitors."[33] Congress, of course, had succinctly declared the purpose of the Telecommunications Act to be the "opening of all telecommunications market to competition," with the aim of "accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans."[34]

Section 251 is the mechanism provided by the Telecommunications Act for opening the local exchange and exchange access markets to competition, described by the Commission as one

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31 Id. at ¶ 244.

32 AT&T Corp., et al. v. Iowa Utilities Board, 119 S.Ct. 721 at 734.

33 Id. at 726.

34 Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-458, 104th Cong., 2nd Sess. 113 (1996).

of two "cornerstones of the framework Congress established in the 1996 Act to open local markets to competition."[35] As described by the Commission, "Section 251's primary purpose is to foster competition that otherwise would not likely develop in local exchange and exchange access markets."[36]

1. No Element Developed When Incumbent Local Exchange Carriers Were Insulated from Competition Can be Deemed "Proprietary"

The essence of a "proprietary" interest is that the interest, beneficial and otherwise, must belong uniquely and exclusively to the party asserting the proprietary claim. With respect to network elements developed prior to the enactment of the Telecommunications Act, accordingly, no proprietary component can exist. This is because such elements were developed at a time when the incumbent LEC was not only insulated from competition, but assured a healthy return on its network investment, by state action.

During its tenure as a monopoly franchisee, all network development and operations undertaken by an incumbent LEC were essentially funded by ratepayer dollars which flowed exclusively to the incumbent LEC as the sole provider of local telephone service in quantities that amounted effectively to a guaranteed rate of return. As described by the Commission, "existing telephone . . . facilities . . . were . . . paid for by captive ratepayers, under regulatory protection from

35 Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order), 13 FCC Rcd. 24011, ¶ 73 (1998), *recon. pending, petition for review filed* U S WEST Communications, Inc. v. FCC, Case No. 98-1410 (D.C.Cir. April 5, 1999).

36 Guam Public Utilities Commission Petition for Declaratory Ruling Concerning Section 3(37) and 251(h) of the Communications Act; Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act (Order), 12 FCC Rcd. 6925, ¶ 41 (1997).

competition and/or inherent economic conditions that conferred a *de facto* monopoly and ensured recovery of costs, however slowly."[37] The benefit of all developmental and operational activities undertaken by the incumbent LEC with respect to its local network prior to the enactment of the Telecommunications Act should, therefore, accrue to ratepayers, as well as shareholders.

TRA is not suggesting that incumbent LECs should relinquish all claims to pre-Telecommunications Act network facilities and data. Incumbent LECs, however, should not be permitted to avoid network unbundling obligations on the basis of proprietary claims associated with facilities and data which pre-date the Telecommunications Act. Ratepayers should be permitted to derive benefit from their involuntary contributions to incumbent LEC networks through the current and future availability of alternative service offerings provided by competitors able to obtain unbundled access to the incumbent LEC networks.

On a forward-looking, post-Telecommunications Act enactment basis, the Commission can and should retain its existing interpretation of "proprietary."[38] As noted above, the Supreme Court did not question the Commission's views in this respect. In its *Local Competition Order*, the Commission expressly found that the large majority of network elements raised no meaningful proprietary concerns. Included among the elements found not to be proprietary in nature were:

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[37] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996 (Report), CC Docket No. 98-146, FCC 99-5, 25 (Released Feb. 2, 1999).

[38] As discussed below, TRA disagrees only with the Commission's view that the "proprietary" limitation does not apply to the "impair" standard with the same force that it applies to the "necessary" standard.

(i) local loops ("we conclude that loop elements are, in general, not proprietary in nature under our interpretation of section 251(d)(2)(A)");[39]

(ii) network interface device ("the record contains no evidence of proprietary concerns with unbundled access to the NID");[40]

(iii) local switching ("the vast majority of parties that discuss unbundled local switching do not raise proprietary concerns with the unbundling of either basic local switching or vertical switching features");[41]

(iv) tandem switching ("[p]arties do not contend, pursuant to section 251(d) (2)(A), that tandem switches are proprietary in nature");[42]

(v) transport ("the record provides no basis for withholding . . . [interoffice] facilities from competitors based on proprietary considerations");[43]

(vi) signaling links and signaling transfer points ("we conclude that the unbundling of signaling links and STPs does not present proprietary concerns with respect to the incumbent LEC");"[44]

(vii) call-related databases ("we conclude that, in general, unbundled access to call-related databases does not present proprietary concerns with respect to section 251(d)(2)(A)");[45]

(viii) service management systems ("we conclude that unbundled access to SMSs used for other than AIN does not present proprietary concerns with respect to section 251(d)(2)(A)");[46] and

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39 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 388.

40 Id. at ¶ 393.

41 Id. at ¶ 419.

42 Id. at ¶ 425.

43 Id. at ¶ 446.

44 Id. at ¶ 481.

45 Id. at ¶ 490.

46 Id. at ¶ 498.

(ix) operator services and directory assistance ("[p]arties generally did not identify proprietary concerns with unbundling access to operator call completion services or directory assistance. Incumbent LECs generally did not claim a proprietary interest in their directory assistance database").[47]

The Commission also imposed several general limitations on the reach of the term "proprietary" which TRA urges it to retain here. For example, the Commission declined to recognize proprietary concerns when matters addressed by industry standard-setting bodies or common or industry-wide usage were involved.[48] Ubiquity, either in the form of common knowledge or common usage, is conceptually the antithesis of the term "proprietary." The Commission also refused to treat as proprietary entire elements identifiable components of which may be proprietary in nature, if competitors do not require access to the proprietary components.[49] If the asserted proprietary interest is not implicated by the network unbundling, it cannot provide a legitimate basis for avoidance by an incumbent LEC of its network unbundling obligations. And the Commission discounted proprietary concerns raised with respect to elements whose proprietary aspect would be "compromised" by Section 251(c)(4) resale.[50] Proprietary concerns lose their force if the facilities or data as to which the proprietary interest is asserted are provided to competitors in the resale context.

TRA would add to this list of general themes, elements as to which whatever proprietary concerns were once raised have been rendered moot by industry practice over the past three years. For example, incumbent LECs once argued that the interfaces used to access their

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47 Id. at ¶ 539.

48 Id. at ¶¶ 481, 490

49 Id. at ¶ 498.

50 Id. at ¶ 419.

operations support systems were proprietary.[51] Whatever merit that claim once had has been obliterated by interaction with such interfaces by competitive providers.

The Commission should reaffirm all of the above findings, thereby limiting the extent of the analysis it must undertake under Section 251(d)(2)(A), as well as Section 251(d)(2)(B). Section 251(d)(2)(A) expressly requires an analysis of the "necessity" of incumbent LEC provision of only "such network elements as are proprietary in nature."[52] While Section 251(d)(2(B) is less clear, TRA submits that the provision is better read as limited to proprietary elements. TRA believes that the reference is Section 251(d)(2)(B) to "such network elements" is to the immediately preceding Section 251(d)(2)(A) reference to "such network elements as are proprietary," rather than to the earlier Section 251(d)(2) general reference to "network elements." The former interpretation is necessary to avoid rendering Section 251(d)(2)(A)'s restriction to proprietary elements a nullity, because the failure of an incumbent LEC to provide access to a network element which is not available from another source would necessarily impair a competitor's ability to provide service. Hence, if all network elements were subject to Section 251(d)(2)(B)'s "impair" standard, Section 251(d)(2)(A)'s "proprietary" limitation would not be a limitation at all. It is a well settled principle of statutory construction that statutory provisions should not be construed to render them insignificant or without meaningful effect.[53]

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51 Id. at ¶ 521.

52 47 U.S.C. ¶ 251(d)(2)(A).

53 *See, e.g.*, United v. American Trucking Associations, 310 U.S. 534 (1940); Sutton v. United States, 819 F.2d 1289 (5th Cir. 1987).